A

DANAHARTA MANAGERS SDN BHD

v.

SAMAWORLD (ASIA) SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
NOOR AZIAN SHAARI JC
[CIVIL SUIT NO: S7-24-2613-05]
2 JUNE 2006

C ***LAND LAW:*** *Caveat - Private caveat - Application for removal - Plaintiff's rights over lands as registered chargee - Whether indefeasible - Whether defendant has caveatable interest - Whether there were serious issues to be tried - Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng*

D The plaintiff herein prayed for an order against the defendant that the private caveats registered by the defendant against lands held under HS(D)10379, PT11202 and HS(D) 10565, PT11388, both of Mukim Bentong, Pahang ('the said lands') be removed and no further caveat may be lodged by the defendants or its nominees. The facts were that Samaworld (Malaysia) Sdn Bhd ('the borrower') was the registered proprietor of the said lands. By virtue of an acquisition, Danaharta Managers (L) Ltd ('DML') had acquired all the rights, title and interest relating to the loan facilities granted to the borrower by BBMB International Bank (L) Ltd ('BIBL') and had been assigned to the same. Thereafter, pursuant to the Pegurusan Danaharta Nasional Bhd Act 1998 ('the Danaharta Act') and the vesting certificate issued, all rights, title and interest in and with respect to, *inter alia*, the aforesaid loan facilities and the two charges which were created by the borrower in favour of BIBL over the said lands to secure the said loan facilities were vested in the plaintiff. The borrower defaulted in repayment of the sums due under the said loan facilities and pursuant to its rights under the Danaharta Act and the National Land Code, the plaintiff proceeded to realize the charges over the said lands to recover monies due under the borrower's defaulted facilities and had entered into a sale agreement with a third party. However, the defendant had entered a private caveat over the said lands. The issues that arose were (1) whether defendant was entitled to protect its vital interest in the said lands as it held 49% of the equity in the borrower and (2) whether plaintiff's legal right over the said lands as registered chargee was indefeasible and (3) whether defendant raised serious issues to be tried.

E

F

G

H

I

Held (allowing plaintiff's claim):

(1) For the plaintiff, its legal right over the said lands as registered chargee was indefeasible. There was no evidence of the purported interest of the defendant to the said lands and the said lands were wholly owned by the borrower at all material times. The plaintiff's registered interest was in priority over any purported interest the defendant may have over the said lands (which interest was denied). (para 13)

(2) The sale of the said lands to a third party should not be inhibited by the existence of the defendant's caveat. The defendant had no caveatable interest in the said lands as envisaged by the National Land Code and the principles laid out in the case of *Luggage Distributors* even though it owned 49% of the equity in the borrower and there were also no serious issues to be tried. (para 26)

Case(s) referred to:
Anafartalan Cadderi Sdn Bhd v. Southern Investment Bank Bhd [2003] 1 MLJ 561 ***(refd)***
Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***
Eng Mee Yong & Ors v. V Letchumanan [1979] 2 MLJ 212 ***(refd)***
Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 2 CLJ 713 CA ***(refd)***
Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA ***(refd)***
Wallersteiner v. Moir (No 2) [1975] 2 WLR 389 ***(refd)***

Legislation referred to:
National Land Code, s. 323(1)

For the plaintiff - SM Yoong (TY Ma with him); M/s Shook Lin & Bok
For the defendant - Amrit Singh; M/s Ranjit, Thomas & Kula

Reported by Suhainah Wahiduddin

JUDGMENT

Noor Azian Shaari JC:

[1] By the originating summons filed on 23 November 2005, the plaintiff Danaharta Managers Sdn. Bhd. prayed for an order against the defendant, Samaworld (Asia) Sdn. Bhd. that the private caveats registered by the defendant against lands held under HS

A (D) 10379, PT 11202 and HS (D) 10565, PT 11388, both of Mukim Bentong, State of Pahang (hereinafter referred to as "the said lands") be removed and no further caveat may be lodged by the defendant or its nominees.

B **[2]** The facts of the case are as follows:

(1) Samaworld (Malaysia) Sdn Bhd (hereinafter referred to as "the borrower") is the registered proprietor of the said lands.

(2) By virtue of an acquisition on or about 6 May 1999, C Danaharta Managers (L) Ltd (hereinafter referred to as "DML") had acquired all the rights, title and interest relating to the loan facilities granted to the borrower by BBMB International Bank (L) Ltd (hereinafter referred to as "BIBL") and had been assigned the same.

D (3) Thereafter, pursuant to the Pengurusan Danaharta Nasional Bhd Act 1998 ("the Danaharta Act") and the Vesting Certificate issued on 16 July 2003, all rights, title and interest in and with respect to, *inter alia*, the aforesaid loan facilities and the two charges which were created by the borrower in E favour of BIBL over the said lands to secure the said loan facilities were vested in the plaintiff with effect from 20 June 2003.

(4) The charges over the said lands were created as security for F the said loan facilities granted to the borrower and which facilities became due and owing to the plaintiff, by reason of the matters set out in para 3 above.

(5) The borrower had defaulted in repayment of the sums due under the said loan facilities granted by BIBL to the borrower. G

(6) Pursuant to its rights under the Danaharta Act and the National Land Code 1965, the plaintiff proceeded to realize the charges over the said lands to recover monies due under the borrower's defaulted facilities and had entered into a sale H agreement with a third party.

(7) However, the defendant had entered a private caveat on 24 February 2004 *vide* Presentation No. 538/2004 over the said lands ("the caveat") and the caveat still remains over the lands.

I (8) Based on the defendant's application and statutory declaration, the reason for the defendant's caveat is purportedly that the method of valuation of the said lands by Messrs. Khong & Jaafar is inaccurate.

(9) The defendant is a shareholder of the borrower company and does not have an interest in the said lands. A

[3] The grounds for the plaintiff's application are as follows:

(a) The defendant does not have a caveatable interest in the said lands to support the entry of a private caveat over the said lands, nor do the grounds stated in the said statutory declaration demonstrate any registrable or caveatable interest which ought to be protected by the caveat. B

(b) The defendant does not have any interest over the said lands nor does it even claim such interest in the statutory declaration. There is no serious question to be tried insofar as the plaintiff is concerned. C

(c) The plaintiff's legal rights over the said lands as registered chargee take priority over any purported interest the defendant may have over the said lands (which the defendant does not even claim). D

(d) The balance of convenience lies with the plaintiff for the removal of the caveat, as the plaintiff is severely prejudiced in that a sale of the said lands by the plaintiff would not be successful until the caveat is removed. The plaintiff had already entered into a sale agreement for the said lands with a buyer but was unable to complete the sale by the completion date of 17 October 2005 and obviously such sale is in jeopardy due to the existence of the caveat. E F

(e) The outstanding amounts due from the borrower is currently in the sum of RM141,033,022.19 as at 20 September 2005 and increasing with accruing interest. The sale of the said lands by the plaintiff is therefore essential for the plaintiff to reduce the said amount due. G

(f) The defendant would be in no position to effect payment of damages which the plaintiff will surely suffer if the caveat was permitted to remain on the said lands. H

(g) The plaintiff was incorporated under the provisions of the Danaharta Act, a special legislation enacted in 1998 to resolve the financial crisis which afflicted Malaysia's economy. As set out in the preamble of the Danaharta Act, the main objectives of the Danaharta Act are, *inter alia*: I

A (i) to assist financial institutions by removing impaired assets and to promote the revitalization of the nation's economy by injecting liquidity into the financial system through *(inter alia)* disposition of assets; and

B (ii) to dispose of assets promptly, efficiently and economically for the public good.

[4] The main ground for the defendant having register the caveats is that the defendant is entitled to protect its vital interest in the said lands as it holds 49% of the equity in the borrower.

C **[5]** Arising from this, the defendant further contends that the method of the said lands by the Valuer Messrs. Khong & Jaafar is inaccurate.

D **The Law**

[6] Section 323(1) of the NLC sets out the persons and bodies that can enter a private caveat, namely:

(a) any person or body claiming title to, or any registrable E interest in, any alienated land (or undivided share in any alienated land) or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

F (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b) above.

[7] The plaintiff is the registered chargee of the said lands and its registered title is *prima facie* evidence of its unfettered right under the charges to deal with the said lands. It is for the G defendant now to satisfy the court that there are sufficient grounds in fact and in law for the caveat to remain.

[8] The Court of Appeal in *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng* [1995] 2 CLJ 713 sets out the three stages a H court must consider in an application for the removal of caveats:

(a) the caveator must first satisfy the court that he has a "caveatable interest" in the land;

(b) secondly, the caveator must show that his claim discloses a I serious question meriting a trial; and

(c) third, "the balance of justice, or what Lord Diplock termed in *Eng Mee Yong* as the 'balance of convenience'.

[9] Now, it has to be examined if the defendant satisfies the three (3) conditions enumerated in the case of *Luggage Distributors (supra)* in order to justify the existence of the caveats.

Caveatable Interest

[10] The question here is whether the defendant holding 40% of the equity in the borrower makes the defendant have a caveatable interest in the said lands.

[11] By the authority of *Luggage Distributors (supra)*, caveatable interests in land only relate to interests capable of registration, which are:

(a) registered title;

(b) registrable interests falling short of ownership, ie, leases, charges and easements.

[12] From the above, it is apparent that the defendant's shareholding in the borrower does not give the defendant any caveatable interest in the said lands to entitle the defendant to enter a private caveat or for the caveat to remain in the said lands.

[13] For the plaintiff, its legal right over the said lands as registered chargee is indefeasible. There is no evidence of the purported interest of the defendant to the said lands and the said lands are wholly owned by the borrower at all material times. The plaintiff's registered interest is in priority over any purported interest the defendant may have over the said lands (which interest is denied).

[14] Further, Mohamad Azmi SCJ in *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 held that a shareholder of a company cannot challenge the conduct of the company by means of a private caveat for the alleged purpose of protecting his own interest or the interest of the shareholders and stated:

> It is a well-established principle of law that a limited company incorporated under the Companies Act 1965 and the individuals forming the company are **distinct legal entities**, it might be by one or nine individual of the company (see *Solomon v. Solomon & Co Ltd*) ... (emphasis added).

[15] The Court of Appeal in *Anafartalan Cadderi Sdn. Bhd. v. Southern Investment Bank Bhd. (formerly known as Perdana Merchant Bankers Bhd)* [2003] 1 MLJ 561 quoted Lord Denning in *Wallersteiner v. Moir (No. 2)* [1975] 2 WLR 389:

> It is fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholder and with its own property rights and interests to which alone it is entitled.

Issues To Be Tried

[16] In the Privy Council decision of *Eng Mee Yong & Ors v. V. Letchumanan* [1979] 2 MLJ 212 at 215 it was expressed that the private caveat is likened to a statutory injunction and reference to the injunction principles was made in deciding whether a caveat ought to be removed.

[17] The defendant has not raised any serious issues to be tried to establish the defendant's interest in the said lands.

The Balance Of Convenience

[18] Gopal Sri Ram SCJ said in *Luggage Distributors (supra)*:

> The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice or what Lord Diplock termed in *Eng Mee Yong* as "the balance of convenience ...
>
> It is only upon satisfying that three stages of crucial scrutiny that a caveat may be permitted to remain. That this should be so in only logical; for it is a serious matter to caveat a person's property and unless a case is properly made out, a caveat ought not to be permitted to remain on the register a moment longer than is absolutely necessary.

[19] In the case before me it is clear that the defendant cannot cross the first two hurdles, ie, caveatable interest and raising any issues that merit a trial. Therefore the third stage need not to be considered. However for the purpose of completion, I would examine the third stage in the light of the facts of the case.

[20] A sale of the said lands by the plaintiff is essential to reduce the outstanding amounts due from the borrower which as at 30 September 2005 stood at RM141,033,022.19 and increasing with accruing interest. However, the plaintiff's sale of the said lands to

a third party would not be successful until the defendant's caveat is removed and such sale is in jeopardy due to the existence of the caveat.

[21] The Court of Appeal in *Paya Terubong Estates Sdn. Bhd. v. Pusaka Warisan Sdn. Bhd.* [1998] 2 CLJ 909 aptly held that "The issue as to where the balance of justice lies is a most relevant consideration when determining whether a caveat ought to be permitted to remain upon the register and fetter the right of the appellant as ... registered proprietor to deal with the subject lands."

[22] The plaintiff was incorporated under the provisions of the Danaharta Act, to resolve the financial crisis which afflicted Malaysia's economy. The Preamble of the Danaharta Act sets out the main objectives of the Danaharta Act which reads as follows:

> An Act to provide special laws for the acquisition, management, financing and disposition of assets and liabilities by the Corporation, the appointment of special administrators with powers to administer and manage persons whose assets or liabilities have been acquired by the Corporation and for matters connected therewith or incidental thereto.
>
> [1.9.1998-PU(B) 333/1998]
>
> WHEREAS special provisions are required in the public interest to assist financial institutions by removing impaired assets, to assist the business sector by dealing expeditiously with financially distressed enterprises and to promote the revitalization of the nation's economy by injecting liquidity into the financial system, such goals to be achieved through the acquisition, management, financing and disposition of assets and liabilities:
>
> AND WHEREAS legislation is the only means by which the acquisition, management, financing and disposition of assets and liabilities can be implemented promptly, efficiently and economically for the public good:
>
> AND WHEREAS legislation is the only means by which special administrators may be appointed expeditiously to administer and manage persons whose assets or liabilities have been so acquired:
>
> AND WHEREAS Pengurusan Danaharta Nasional Berhad has been established as a corporation incorporated under the Companies Act 1965 for such purposes:

[23] Thus, basically the Danaharta Act aims to:

(i) assist financial institutions by removing impaired assets and to promote the revitalization of the nation's economy by injecting liquidity into the financial system through *(inter alia)* disposition of assets; and

(ii) dispose of assets promptly, efficiently and economically for the public good.

[24] In order to accomplish these objectives, the plaintiff was given sufficiently wide and broad statutory powers to dispose of charged lands by private treaty, without securing the usual court order as banks and other secured lenders are obliged to do so under the National Land Code.

[25] The Federal Court in *Danaharta Urus Sdn. Bhd. v. Kekatong Sdn. Bhd. (Bar Council Malaysia, Intervener)* [2004] 1 CLJ 701 held that in order for Danaharta to expeditiously and promptly dispose off properties at the best recovery value in line with Parliament's intention, it is important for Danaharta to be in a position to give good title to the properties fast so that purchasers can readily get themselves registered as proprietor after they have paid the full purchase price, and Danaharta should not be restrained by any injunction from completing the sales.

[26] Similarly, in the present case, the sale of the said lands to a third party should not to be inhibited by the existence of the defendant's caveat. However, of upmost importance is that the defendant has no caveatable interest in the said lands as envisaged by the NLC and the principles laid out in the case of *Luggage Distributors (supra)* even though it owns 49% of the equity in the borrower and there are also no serious issue to be tried. Since the defendant, the caveator, cannot cross the first two hurdles, the issue of balance of convenience does not arise and need not be considered.

[27] Under the circumstances, I allowed the plaintiff's claim with cost.